

N.J. SUPREME COURT RULES EMPLOYEES HAVE EXPECTATION OF PRIVACY ON COMPANY COMPUTERS

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To Our Clients and Friends:

On March 30, the New Jersey Supreme Court found that employees have a reasonable expectation of privacy as to personal data stored on company-owned computers. Importantly, however, the Court held that employers, by promulgating clear policy statements prohibiting personal use of company equipment and reserving the company's right to monitor usage, can overcome most (but not all) of this expectation.

In the case, *Stengart v. Loving Care Agency, Inc.*, after a former employee had sued the employer for violating New Jersey's Law Against Discrimination, the employer searched the former employee's company-owned laptop computer and found, in the web browser's history, emails she had exchanged with her personal counsel using her own private, password-protected email account. The employer contended that the employee had waived her privilege by using the company's computer to send these emails, relying on a policy it said it had disseminated. Pursuant to the policy, "[t]he company reserves and will exercise the right to review, audit, intercept, access and disclose all matters on the company's media systems and services at any time, with or without notice." Although the policy permitted employees to make "occasional personal use of the company's email system," the policy stated that "[e]mail and voicemail messages, internet use and communication and computer files are considered part of the company's business and client records. Such communications are not to be considered private or personal to any individual employee."

The Court held Loving Care's policy to be unclear with respect to the specific circumstances at issue: it "d[id] not address the use of personal, web-based e-mail accounts accessed through company equipment. It d[id] not address personal accounts at all. Nor d[id] it warn employees that the contents of e-mails sent via personal accounts can be forensically retrieved and read by the company. Indeed, in acknowledging that occasional personal use of e-mail is permitted, the Policy created doubt about whether those e-mails are company or private property."

The Court made clear, however, that despite its "conclusion that Stengart had an expectation of privacy in e-mails with her lawyer," this "does not mean that employers cannot monitor or regulate the use of workplace computers. Companies can adopt lawful policies relating to computer use to protect the assets, reputation, and productivity of a business and to ensure

compliance with legitimate corporate policies. And employers can enforce such policies. They may discipline employees and, when appropriate, terminate them, for violating proper workplace rules that are not inconsistent with a clear mandate of public policy.”

The Court did, however, place at least one limit on how far such policies can go: an employer can never review and use for its benefit emails exchanged between an employee and his or her attorney. “Because of the important public policy concerns underlying the attorney-client privilege, even a more clearly written company manual — that is, a policy that banned all personal computer use and provided unambiguous notice that an employer could retrieve and read an employee’s attorney-client communications, if accessed on a personal, password-protected e-mail account using the company’s computer system — would not be enforceable.” Companies can discipline employees for spending too much work time communicating with personal counsel, but cannot make use of the emails.

This ruling by the New Jersey Supreme Court appears to be the first time that a state’s high court has addressed an employee’s expectation of privacy with respect to data stored on the employer’s computers. The lower court decisions the Court cited split on the basic question of whether employees have such an expectation, with each decision focusing on whether the employer had a policy, what the policy said and whether the employer went beyond the policy’s four corners.

What this decision highlights, therefore, is the need for all employers — not just those with operations in New Jersey — to focus on their written policies respecting personal use of company-issued computer equipment and the employer’s rights to monitor and access data stored on its systems, how they disseminate those policies and how they monitor compliance.

Please do not hesitate to contact us with any questions.

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